law, viewing all questions of fact as concluded by the action of the commission.[24]

E. H. S.

FALSE SHERIFF'S RETURN STILL CONCLUSIVELY TRUE IN PENNSYLVANIA.—Three recent Pennsylvania cases[1] have brought to life with renewed and startling vigor an ancient doctrine of law which in modern times has shown signs of rapid decay. The theory that a return by a sheriff, complete on its face, is a thing so weighty that its truthfulness must be conclusively presumed between the parties concerned in the action, is a doctrine which can hardly appeal to the reasonableness of the present day lawyer and judge, in view of the changed conditions since the doctrine first came into being.[2] Yet the three cases mentioned re-affirm the old rule, in spite of a recent tendency in Pennsylvania to discard it, and moreover in one[3] of the three the Supreme Court, reversing the Superior Court,[4] extends the doctrine to returns by a constable to a magistrate's court, concerning which the lower court decisions previously had been in direct conflict.[5] The last case, however,

[24]The language of Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 548 (1912) to the effect that "the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order," is cited with approval by the Pennsylvania Supreme Court in deciding the Ohio Valley Case. 260 Pa. 289, 298 (1918). In the Union Pacific case, however, there was no contention that the rate established by the Federal Commission was unreasonable and confiscatory, but it was urged "that the order was beyond the power of the Commission, because entered without any evidence, or finding, that the rates fixed by the carriers were unjust and unreasonable." The different effect of administrative findings of facts where the questions of statutory power and constitutional right are raised has been pointed out.

[1]Frank P. Miller Paper Co. v. Keystone Coal & Coke Co., 267 Pa. 180 (1920); Holly v. Travis, 267 Pa. 136 (1920); James G. Lindsay & Co. v. Pittsburgh Tin Plate and Steel Corporation, 29 Pa. Dist. Rep. 569 (1920).

[2]The question was subjected to a careful analysis in 1916 by Professor E. R. Sunderland, of the University of Michigan Law School, in 16 Columbia Law Review 281.

[3]Holly v. Travis, *supra*, footnote 1. In this case the constable's return showed personal service on the defendant in Lackawanna County, whereas the summons in fact was not served within that county. The case was brought up for review by writ of certiorari.

[4]Holly v. Travis, 71 Pa. Super. Ct. 527 (1919), reversed by this case, which reinstated and affirmed the judgment of the Court of Common Pleas of Lackawanna County, (19 Lacka. Jur. 169).

[5]Among the lower court cases holding that a constable's return is not entitled to the same conclusive force as a sheriff's return are: Commonwealth v. Blankenmeyer, 19 Lanc. L. R. 87 (1901); Minogue v. Ashland Borough, 30 Pa. C. C. 205 (1905); Nissley v. Hoffman Bros., 20 Lanc. L. R. 49 (1902); Neff v. Gallagher, 16 Pa. C. C. 219 (1895). *Contra* to this position and in accord with the present decision of the Supreme Court are: Keech v. Price, 16 Pa. Dist. Rep. 766 (1907), which contains a summary of the conflicting cases; Link & Co. v. Repple, 7 Pa. C. C. 138 (1890); Foy v. Rice, 3 Lacka. Jur. 17 (1893); Young v. Trunkley, 22 Pa. C. C. 127 (1899).

is in the face of a strong dissent from Chief Justice Brown,[6] with whom Justices Von Moschzisker and Frazer concurred.

The rule that a complete sheriff's return is conclusive, and that the only remedy for a return false in fact is by an action for damages against the sheriff, had its origin even before the year books of Edward III.[7] It is found in Rolle's Abridgement,[8] in Kitchin,[9] in Comyn's Digest,[10] and in Coke's Institutes.[11] Yet in spite of the weight of the authorities in which the doctrine is stated, the Courts in most of the United States have recognized its unsuitability to modern conditions, and have abolished or modified it, in a majority of instances without the aid of legislative enactment.[12] Judicial analysis has undermined the reasons said to support the rule,—that the sheriff being a court officer should be believed, and that the return is a part of the records of the court and thus not subject to attack. It is the second of these two reasons which alone is given by the Pennsylvania Supreme Court in its recent decisions,[13] although an earlier Pennsylvania decision had pointed out that the court record itself may be subject to correction.[14]

[6]The Chief Justice points out that this decision with its reasoning gives the magistrate's court the dignity of a court of record, whereas by Art. V, Sec. 10, of the state constitution it is classed among courts not of record. He denies that the Service Act of 1901 (July 9, 1901, P. L. 614) in providing that service of writs by constables shall be "with like effect as similar writs served by the sheriff" means that the return made by the constable shall have the conclusive effect given to the sheriff's return by common law.

[7]Y. B. 1 Edw. III 13 b (1327); Y. B. 1 Edw. III 24 b (1327); Y. B. 40 Edw. III 6 (1367); Y. B. 50 Edw. III 7 (1377). The last case is an illustration of the extremes to which the rule led, for in that case, where the sheriff had returned that he had taken the bodies of two joint defendants, one of the two was not allowed to show that the other had died before the date of the writ, for that would be contradicting the sheriff's return.

[8]2 Rolle's Abridgement 462 (1668).

[9]John Kitchin—"Jurisdictions: The Lawful Authority of Courts Leet, Courts Baron, Court of Marshalseyes, Court of Pypowder and Ancient Demesne," (1651), pages 559 ff.

[10]Comyn's Digest of the Laws of England, Title "Retorn," (G) "Averment Against a Return."

[11]2 Coke's Inst. 452 (1628)—"By the Common Law the Plaintiff could not have an averment against the return of the Sheriff, for the Sheriff is but an officer to the Court, and hath no day in Court to answer to the party."

[12]In Green v. C. B. & Q. Ry. Co., 205 U. S. 530 (1906), an appeal from the Circuit Court for the Eastern District of Pennsylvania, and in Mechanical Appliance Co. v. Castleman, 215 U. S. 437 (1909), it was held that a Federal court sitting in a state where the conclusive rule prevailed in the state courts, should not follow that rule. Professor Sunderland in the article referred to above in footnote 2, collects the cases from twenty-one states which have abolished the rule without statutes, from six where it has been abolished by statute, from six where it has been modified with or without statute, and from seven besides Pennsylvania which still maintain the rule of conclusiveness.

[13]Frank P. Miller Paper Co. v. Keystone Coal & Coke Co., *supra*, footnote 1, at page 182; "One reason therefor may be found in the fact that the sheriff's return is a part of a court record."

[14]Vastine v. Fury, 2 S. & R. 426 (Pa. 1816), per Tilghman, C. J. at page 432: "The plaintiff in error contends, that the first return made by the sheriff was unalterable, and conclusive. To this I cannot agree. The reason most relied on against the amendment of the return is, that after the term the Court had no power to alter the record. But the ancient strictness in this respect has been long relaxed. Judgments are every day opened, more than one term after their entry; and records are amended even after writs of error brought."

Pennsylvania until 1903 showed few signs of breaking away from the old rule.[15] In that year, in a case involving an incomplete return (to which the rule never applied), Justice Mitchell after giving the rule as to the conclusiveness of a complete return, stated:[16] "While it is still the law that a sheriff's return is conclusive on the parties and cannot be contradicted, yet modern practice is liberal in allowing inquiry into the actual facts where the return itself is not full and explicit." This dictum was the basis of several subsequent decisions of the lower courts which abandoned the old rule entirely.[17] Other courts, criticizing the old rule, seized on small differences to distinguish cases.[18] And now, by the recent decisions, the rule is re-established in almost its original strength. The situation in Pennsylvania today, where the sheriff's return complete on its face is in fact false, is that in the absence of actual fraud, the return is conclusive between the parties and the only remedy is against the sheriff, except in two situations:

(1) Where the defendant, actually not served, has against him a judgment by default, which he now seeks to open by appealing to the equitable powers of the court and by showing at the same time that he has a good defense in case he is now allowed to file an affidavit of defense.[19]

(2) Where, though the return shows a proper service, the defendant wishes to challenge his amenability to suit in the jurisdiction where suit is brought. Prior to the 1915 Practice Act, he might do this by plea in abatement, but not by motion or rule.[20] Under the 1915 Act, which abolished pleas in abatement,[21] the Supreme Court by way of dictum in a recent opinion[22] stated that

[15]Diller v. Roberts, 13 S. & R. 60 (Pa. 1825); Benham Iron Works v. Hutchinson, 101 Pa. 359 (1882); Bennethum v. Bowers, 133 Pa. 332, 19 Atl. 361 (1890).

[16]Park Bros. & Co. v. Oil City Boiler Works; 204 Pa. 453, 54 Atl. 334 (1903).

[17]Lyons v. Mann, 31 Pa. C. C. 24, 14 Pa. Dist. Rep. 104 (1905); Miller Paper Co. v. Keystone C. & C. Co., 28 Pa. Dist. Rep. 775 (1919).

[18]Daly v. Iselin, 10 Pa. Dist. Rep. 193 (1900); Matthews v. Morris Glass Co., 14 Pa. Dist. Rep. 399 (1905); Detrich v. Sutton, 15 Pa. Dist. Rep. 621, (1905); Stipp Co. v. Sax & Abbott Co. 23 Pa. Dist. Rep. 118 (1913). In the last case, Fuller, P. J., said, "The conclusiveness of a sheriff's complete return except in an action for false return, is an archaic proposition which ought to be abolished, but nevertheless is too firmly established to be ignored."

[19]Compare Flaccus Leather Co. v. Heasley, 50 Pa. Super. Ct. 127 (1912) at page 130-31. See also Martin P. J., in James G. Lindsay & Co., v. Pittsburgh Tin Plate & Steel Corp., (1920), cited in footnote 1,—"The ample equitable powers vested in the courts of this State to open judgment, on proper cause being shown are sufficient protection to prevent injustice to litigants," resulting from the conclusiveness rule.—Compare Phila. Rule of Court (Common Pleas) number 149 providing for opening judgment by default, "when deemed necessary for the purposes of justice."

[20]Matthews v. Morris Glass Co., 14 Pa. Dist. Rep. 399 (1905); Stipp Co. v. Sax & Abbott Co., 23 Pa. Dist. Rep. 118 (1913).

[21]Act of 14th of May, 1915, P. L. 483, Section 3.

[22]Frank P. Miller Paper Co. v. Keystone Coal & Coke Co., (1920) cited in footnote 20: "Prior to the Act of May 14, 1915, P. L. 483, a defendant, by a plea in abatement, could challenge his amenability to suit in the jurisdiction where suit is brought and, under that act, may do so in an affidavit of defense."

the proper proceeding in such a case is to challenge the jurisdiction in an Affidavit of Defense.

On principle today it would seem that the rule of conclusiveness of the sheriff's return has outworn its usefulness, and remains in force in a few states only because of the conservatism of the law. This conclusion has been reached by many judges and legal writers. It seems to have been the thought in 1918 of Justice Kephart (then of the Superior, but now of the Pennsylvania Supreme Court), when he wrote in deciding a case[23] under the rule: "It is unnecessary for us to discuss the reasons for this rule. Until the Supreme Court of the legislature change or modify the rule, it must continue to be the law governing the effect of a sheriff's return regular on its face." This quotation is given by Justice Walling in one[24] of the recent cases considered, in which the Supreme Court follows the rule. From these cases it is apparent that the Supreme Court itself is unwilling to make the desired change. The conclusion which seems reasonable is that the time has come for the legislature of the state to take action.

R. D.

THE USE OF CONTRACTS OF GUARANTY BY COMMERCIAL CORPORATIONS IN FURTHERANCE OF CORPORATE BUSINESS.—Any discussion of the doctrine of *ultra vires* in its relation to contracts of guaranty made by one commercial corporation on behalf of another, is met at the outset with the necessity for a definition of terms. There is perhaps no portion of the law of private corporations which is so settled in its basic principle, and yet so strikingly fugitive in its application by the court in the particular cases presented to it. *Ultra vires* in its proper conception is the modern nomenclature for acts of a corporation which exceed or are beyond the powers conferred by law upon the legal entity, acting through any of its instrumentalities.[1] It does not properly concern itself with the authority of corporate agents as marked out by the corporation, nor with the power of the majority interest to act without the consent of the minority, nor with the liability of the corporation which, having received the benefits of a contract, pleads *ultra vires* in defense. Much confusion in the signification of *ultra vires* has resulted from its judicial misapplication. Fundamentally, it concerns itself only with the question of the power of the corporation to act in the particular instance.

The modern commercial corporation is a creature of statute. It acts only by and through the authority vested in it by its charter. It has no natural or inherent rights or capacities. The charter of a corporation, read in the light of the general laws which are

[23]Keystone Telephone Co. v. Diggs, 69 Pa. Super. Ct. 299 (1918) at page 301.

[24]Frank P. Miller Paper Co. v. Keystone Coal & Coke Co., *supra.*

[1]Pomeroy Specific Performance, par. 56; Reese, Ultra Vires, p. 26.